Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
MINORITY TELEVISION PROJECT, INC.	)	File No. 00-IH-0153
	)	File No. 01-IH-0652
Licensee of Noncommercial Educational	)	NAL/Acct. No. 200232080020
Television Station KMTP-TV	)	Facility #43095
San Francisco, California	)	FRN # 0005704366

FORFEITURE ORDER

Adopted: December 19, 2003 **Released:** December 23, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. By this *Forfeiture Order*, we impose a forfeiture of $10,000 on Minority Television Project, Inc. ("Minority"), licensee of noncommercial educational television Station KMTP-TV, San Francisco, California, for its willful and repeated broadcast of advertisements over the station, in violation of section 399B of the Communications Act of 1934, as amended (the "Act"),[1] and section 73.621(e) of the Commission's rules.[2] We take this action pursuant to 47 U.S.C. § 503(b)(1)(D) and 47 C.F.R. § 1.80(f)(4). We further dismiss Minority's pending June 13, 2000, Request for Declaratory Ruling as moot.

II. BACKGROUND

2. This case arose from allegations raised in a Media Bureau ("MB") proceeding and referred to the Enforcement Bureau ("Bureau") for resolution. In the MB proceeding, Minority submitted a Petition for Declaratory Ruling that sought Commission approval of numerous underwriting announcements that the station had broadcast, arguing that the announcements comply with the pertinent statutory and Commission rule provisions that prohibit the broadcast of commercial messages over noncommercial educational stations. In response, AT&T Broadband, LLC ("AT&T"), operator of cable systems in the San Francisco market, and Lincoln Broadcasting Company ("Lincoln"), licensee of commercial Station KTSF(TV), Brisbane, California, opposed Minority's Request, and complained that KMTP-TV has continuously broadcast prohibited underwriting announcements since June 1999. By letters dated November 9, 2001, and February 25, 2002, the Bureau inquired of Minority, and received numerous responsive pleadings thereafter from both Minority and Lincoln.

[1] 47 U.S.C. § 399b.

[2] 47 C.F.R. § 73.621(e).

3. By *Notice of Apparent Liability for Forfeiture*,[3] the Chief, Enforcement Bureau rejected Minority's arguments, and found that it had apparently violated the pertinent statute and Commission rules, and proposed a monetary forfeiture of $10,000.[4] On September 9, 2002, Minority responded to the *NAL*, arguing that the Bureau's ruling was erroneous, and that the proposed forfeiture should be rescinded.[5] Minority further asks that the Commission act on its Petition for Declaratory Ruling, which sought to establish that the announcements in controversy comply with Commission underwriting announcement guidelines.

III. DISCUSSION

4. Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities. 47 U.S.C. § 399b(a). As noted above, noncommercial educational stations such as Station KMTP-TV may not broadcast advertisements. Although contributors to noncommercial stations may receive on-air acknowledgements, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors' products, services, or business.

5. Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease.[6] At the same time, however, the Commission has acknowledged that it is at times difficult to distinguish between language that promotes versus that which merely identifies the underwriter. Consequently, it expects only that licensees exercise reasonable, good faith judgment in this area.[7]

6. *Commission Standards*. Minority first argues that the difficulty licensees encounter in distinguishing language that "identifies" versus that which "promotes" a contributor's products or services is "so pervasive--no matter the language involved"[8] that it renders the Commission's policy identified in either the *Public Notice* or the Commission precedent underlying that Notice[9] "incapable of being applied in a consistent and objective manner,"[10] and that the Bureau's *NAL* relying on that policy was "based solely on subjective judgments."[11] Minority further contends that the *NAL* failed to provide "much needed guidance in attempting to comply with the Commission's rules,"[12] and asks that the

[3] *In the Matter of Minority Television Project, Inc.*, 17 FCC Rcd 15646 (EB 2002) ("*NAL*").

[4] *See id*.

[5] *See Response of Minority Television Project, Inc.*, filed September 9, 2002 ("*Response*").

[6] *See In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations,* Public Notice (1986), *republished*, 7 FCC Rcd 827 (1992) ("*Public Notice*").

[7] *See Xavier University*, 5 FCC Rcd 4920 (1990).

[8] *Response* at 3.

[9] *See Commission's Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations,* 90 FCC 2d 895 (1982) ("*1982 Policy Statement*"), *recon*., 97 FCC 2d 255 (1984) (*"1984 Policy Statement"*) (collectively, the "*Policy Statements*").

[10] *Response* at 3.

[11] *Id.*

[12] *Id*.

(continued....)

Commission "re-visit the issue and clarify its standards."[13]

7. The Commission has recognized that "it may be difficult to distinguish at times between announcements that promote and those that identify."[14] Thus, it defers to "reasonable, good faith judgments" by licensees and finds violations only where material is "clearly" promotional as opposed to identifying.[15] We believe that this test is sufficiently clear and objective particularly as applied in this case. As discussed in further detail below, we believe that any reasonable licensee, acting in good faith, would have readily concluded that these announcements were "clearly" promotional.

8. Minority contends that the *NAL* erred in citing announcements that included language or images that "'heavily dwelled' on the sponsor's product's particular features, or "'encourage[d] patronage."[16] Minority argues that, because the Commission did not articulate these particular factors in either the *Public Notice* or the *1984 Policy Statement*, they cannot be relied on as a basis for Commission sanction in this case. Similarly, Minority argues that the *NAL's* reliance on unpublished or staff-level precedent undermines the *NAL*'s validity.[17]

9. First, the validity of findings proposed in the *NAL* is not called into question merely because the Commission itself has not, in its earlier policy pronouncements--including the *Public Notice* and the *Policy Statements*--or in subsequent cases, directly discussed each possible factor that might be present in explaining a prohibited comparative or promotional expression. Specifically, Minority objects to the *NAL's* explanation that certain announcements were promotional because they "heavily dwell on their underwriter's products or services at length" [18] or "encourage patronage." [19] Minority points to no precedent, issued by the Commission or its staff, substantively at odds with the *NAL's* analysis. Indeed, the analysis is fully consistent with prior Commission precedent. We believe that any reasonable licensee acting in good faith would recognize that announcements that heavily dwell on the products or services at length and/or encourage or induce patronage are promotional rather than simply used to identify. Indeed, contrary to Minority's argument that it lacked notice that the airing of such announcement was impermissible, the *Public Notice* unambiguously reminds licensees that Commission policy specifically forbids the use of announcements that "contain an inducement to buy, sell, rent or lease" the underwriter's products.[20] The fact that the *NAL* noted that such finding was consistent with the approach also followed in past unpublished letter rulings does not diminish its validity.[21] Indeed, while we did not cite the unpublished letters to suggest they be used against Minority, they do underscore the consistency in the

(...continued from previous page)

[13] *Id.*

[14] *Xavier*, 5 FCC Rcd at 4920.

[15] *Id.*

[16] *See NAL* at ¶¶ 15, 25.

[17] *See NAL* at ¶¶ 12, 13, 15, 17, 22, 25, 28.

[18] *See Board of Education of New York (WNYE-TV)*, 7 FCC Rcd 6864 (MMB 1992).

[19] The actual language used in the *NAL* was "induce patronage." *NAL* at ¶ 25.

[20] *Id.*

[21] *See, e.g.,* Letter of the Chief, Complaints & Political Programming Branch, Enforcement Division, to Evansville-Vanderburgh School Corporation (WPSR(FM)) (MMB March 23, 1999).

Commission's handling of such matters.

10. *Foreign-Language Broadcasts*. Minority argues further that our application of the statute to its announcements was constitutionally suspect because we did not take into account aspects of Asian culture inherent in the text of each announcement.[22] Minority contends that, in so doing, the *NAL* improperly discriminated against licensees, such as Minority, whose programming caters to members of minority populations who speak foreign languages.[23] Minority's arguments are without merit. First, we accepted the English translation of the broadcasts that Minority proffered, and, consistent with the Act and applicable precedent, found that the announcements violated the provisions of section 399B.[24] Moreover, licensees are responsible for ensuring that material broadcast in a foreign language conforms to the requirements of the Act and the Commission's rules.[25] Thus, the Commission does not recognize any special exception to licensee responsibility based upon the fact that the programming at issue is in a foreign language.[26] Moreover, for the reasons specifically noted in the *NAL*, the federal Court Interpreters' Act[27] cited by Minority in its response to the *NAL*[28] does not bear on the Commission's substantive analysis of foreign-language underwriting announcements,[29] and Minority has not demonstrated otherwise.

11. *Good Faith Judgment*. Minority further contends that the *NAL* failed to defer to the licensee's reasonable good faith judgment consistent with the Commission's pronouncements in *Xavier*.[30] Minority contends that its internal station underwriting policy is consistent with both the Commission's standards and those of leading public broadcasters, and that the *NAL* failed to accord due deference to it, as the licensee, in its application of those standards regarding the announcements in question.[31] Moreover, Minority argues that the *NAL* did not explain how Minority "lacked good faith" in broadcasting them.[32] We reject these arguments. Contrary to Minority's implication, licensee discretion under *Xavier* is not unlimited, but is constrained by the bounds of reason.[33] The *NAL* properly evaluated Minority's discretion under *Xavier* through a reasonable objective intent standard,[34] and concluded that

[22] *Response* at 5. Minority argues that, in failing to apply to this case the standards set forth in the federal Court Interpreter's Act, the *NAL* improperly rejected the congressional mandate of "cultural analysis." *Id.* at 7. Minority further contends that the *NAL,* in proposing a monetary fine for announcements that, if analyzed that in their proper cultural context, would be deemed to comply with Commission policy, imposed a "chilling effect" on the licensee's speech, and did not afford the "quasi-suspect class" of foreign language-speaking broadcasters like itself with the appropriate standard of heightened constitutional protection, citing *U.S ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970) and *Olagues v. Russioniello*, 797 F.2d 1511 (9th Cir. 1995) (*en banc*), in support. *Id.* at 7-8.

[23] *Id*. at 8.

[24] *NAL* at ¶¶ 7-9.

[25] *See Licensee Responsibility to Exercise Adequate Control Over Foreign Language Programs,* 39 FCC 2d 1037 (1973).

[26] *Id*.

[27] 28 U.S.C. § 1827(j).

[28] *Response* at 6.

[29] *NAL* at ¶ 8, n.7.

[30] *Response* at 9.

[31] *Id*.

[32] *Id*.

[33] *See In re Window to the World Communications, Inc. (WTTW(TV))*, DA 97-2535 (MMB December 3, 1997), *forfeiture reduced*, 15 FCC Rcd 10025 (EB 2000).

[34] *Id*.

the announcements in question violated section 399B of the Act based on the total circumstances of the case, including the text and visual aspects of the announcements themselves, and Minority's explanations, and then applying the pertinent Commission underwriting policy and precedent.[35] After again reviewing the record, we conclude that no reasonable licensee, exercising its good faith judgment, could conclude that these announcements are anything but promotional.

12. *Record Evidence and Specific Announcements*. Minority alleges that the *NAL* "overlooked and mischaracterized record evidence,"[36] and that its determinations as to specific announcements are erroneous.[37] Except as to the station's broadcast of the State Farm announcement, we disagree.[38] Contrary to Minority's assertion, the *NAL* properly relied on the complainant's translations for the Met-Life, Scandinavian Furniture, Sincere Plumbing and East West Bank announcements because the licensee failed to provide any alternative versions.[39] Moreover, to the extent that Minority commented on the complainant's translations for those announcements, we accepted Minority's version of the translation and Minority's stated reasons for airing them, and accorded the licensee due accord in light of the full evidence of record.[40] Contrary to Minority's assertion, the *NAL* acknowledged that the licensee had disputed aspects of the complainant's grammar and phrasings, but after accepting Minority's views, concluded that these differences did not impact the announcements' overall meaning.[41] As discussed in the *NAL*, that analysis was not limited to the announcements' linguistic elements alone, but also considered their visual aspects.[42]

13. Minority specifically asserts that the *NAL*'s finding that the announcement made on behalf of State Farm was erroneous.[43] Minority argues that the Act requires there to have been a *quid pro quo* exchange of consideration between the underwriter and the licensee for a violation of section 399B to exist.[44] Minority contends that, in this case, there was no violation because no support of any kind was given except for the underlying program and announcement themselves, and that these materials were not provided by State Farm, but by an independent producer.[45] Minority argues that the station's broadcast of the State Farm announcement was therefore unsupported and harmless. We reject this argument. The Act does not require that the consideration involved be supplied directly by the sponsor or underwriter

[35] *NAL* at ¶¶ 4-9.

[36] *Response* at 10.

[37] *Id*. at 11.

[38] For the reasons discussed *infra*, we agree with Minority that its broadcast of the State Farm announcement should not have been considered against it in the *NAL*.

[39] Minority contends that its translations for those announcements are contained in its March 25, 2002, Reply to the staff's February 25, 2002, letter of inquiry ("*Reply*") at Exhibit L-3. *Id*. at 11. However, its *Reply* contains no such material, only an Exhibit marked with the letter "L," which is comprised only of the one-page Statement of announcement reviewer Candy Chan. Moreover, Ms. Chan's Statement does not address the announcements in question, nor has Minority provided them in its Response to the *NAL*. The translations provided by Minority in its *Reply* are contained at Exhibit P to that pleading, and include its translations for the announcements made on behalf of Yip's Auto World and Ulfert's Furniture, which were duly acknowledged in the *NAL*. *See NAL* at ¶ 23.

[40] *NAL* at ¶¶ 23-25.

[41] *NAL* at ¶ 23, n.19.

[42] *NAL* at ¶ 23-29.

[43] *Response* at 12-13.

[44] *Id.*

[45] *Id.*

itself.[46] The Commission has long held that promotional statements made on behalf of for-profit entities, made in exchange for the receipt or reasonable anticipation of consideration, are prohibited under section 399B, and that cognizable consideration may take many forms.[47] In this case, the fact that a third-party independent producer, and not State Farm, supplied the programming and promotional announcement to the station, though immaterial to the issue of whether the licensee violated section 399B, is, however, a mitigating factor under the circumstances of this case.[48] Therefore, we will not consider Minority's broadcast of the State Farm announcement in assessing the forfeiture amount.[49]

14. Minority also argues that the *NAL* erred in concluding that the announcements made on behalf of Gingko-Biloba Tea and Korean Airlines were promotional, contending that the *NAL* wrongly rejected its explanation that the presentations were value-neutral because they were intended to be "farcical" or "harmless image announcements," respectively.[50] We disagree. For the reasons set forth in the *NAL*, the announcements in question exceeded the identification-only purpose of underwriting announcements and were clearly promotional.[51]

15. We further reject Minority's argument that the *NAL* erred in proposing the forfeiture amount based on the 1,911 times that the announcements were aired during the years 2000 through 2002, instead of the number of announcements at issue, 18.[52] Minority cites no authority for its contention that repeated broadcasts of prohibited underwriting announcements should be aggregated, and the applicable statute and Commission rule on this issue provides otherwise.[53] Except as it pertained to the State Farm

[46] 47 U.S.C. § 399b(a)(1) specifically provides: "for purposes of this section, the term 'advertisement' means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended to promote any service, facility or product offered by any person who is engaged in such offering for profit."

[47] *1982 Policy Statement*, 90 FCC 2d at 911-12, ¶¶ 26-28. While the Commission has acknowledged that non-commercial licensees have discretion to air announcements promoting for-profit entities where the station wishes to make listeners aware of a for-profit entity's "transitory events," it required that licensees make such announcements only where public-interest determinations, and not economic considerations, were the basis for the announcements. In this case, Minority made no such claim concerning any announcement.

[48] *See In re Window to the World Communications, Inc. (WTTW(TV))*, DA 97-2535 (MMB December 3, 1997), *forfeiture reduced*, 15 FCC Rcd 10025 (EB 2000). In that case, the Mass Media Bureau found consideration to exist where an announcement made on behalf of Prudential Securities and its underlying programming were supplied by a third-party producer. However, the Mass Media Bureau took cognizance of, and found mitigating, the manner in which the announcement and programming were supplied to the station -- that they were not station-produced but were supplied automatically through satellite feed and inadvertently aired. In this case, Minority similarly claimed that the State Farm announcement was contained as part of a satellite-feed contained in the program "Minority Business Report," and was inadvertently aired. *See* Response of Minority Television Project, Inc., to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated December 20, 2001, at 2, n.1

[49] Minority broadcast the State Farm announcement only once, on September 25, 2000. *See NAL* at 13.

[50] *Response* at 13.

[51] *NAL* at ¶ 21.

[52] *Response* at 14; *NAL* at ¶ 30, n.24. Although Minority contends that we took into consideration the broadcast of 20 separate underwriting announcements, both the discussion contained in the *NAL* and the list set forth in the ruling's appended Table A indicate that only 18 announcements were considered.

[53] *See* 47 U.S.C. § 503(b)(2); note to 47 C.F.R. § 1.80(b)(4). Under section 503(b) of the Act, each prohibited broadcast may be deemed to constitute a separate offense. *See also The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"). The base amounts for enhanced underwriting violations listed in the Commission's *Forfeiture Guidelines* are $2,000.00 for a single violation or single day of a continuing violation.

announcement, the *NAL* properly considered the total circumstances of the case, including the number of announcements, the duration, gravity, egregiousness, and continuing nature of the violations involved.[54] In any event, given the large number of promotional announcements, we believe that a $10,000 forfeiture is hardly excessive in light of the $2,000 base amount for a single violation.[55] Finally, Minority seeks a ruling on its Petition for Declaratory Ruling in which it requested that the Commission declare that the specific underwriting announcements in question are consistent with applicable statutory and regulatory standards.[56] In view of our action affirming, in all but one instance, the *NAL*'s finding that the subject announcements violated section 399B of the Act and Section 73.621 of the Commission's rules, we shall dismiss Minority's Petition for Declaratory Ruling as moot.

IV. FORFEITURE

16. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.[57] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[58] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.[59] As set forth above, we conclude under this standard that Minority is liable for a forfeiture for its apparent willful violation of 47 U.S.C. § 399b and 47 C.F.R. § 73.621.

17. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of $2,000 for enhanced underwriting rule violations.[60] The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[61] In this case, taking all of these factors into

[54] *NAL* at ¶¶ 30-32.

[55] Indeed, even if we took out of the forfeiture the six specific announcements challenged by Minority, apart from the State Farm announcement that we now exclude, the remaining 11 unlawful announcements would still justify a forfeiture of $10,000. *See* ¶¶ 12-14, *supra*.

[56] *Response* at 14.

[57] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); s*ee also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.,* 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.,* 16 FCC Rcd at 1362, ¶ 9.

[58] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[59] *See, e.g., SBC Communications, Inc.,* Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

[60] *See Forfeiture Policy Statement*, 12 FCC Rcd at 17113; 47 C.F.R. § 1.80(b).

[61] *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01, ¶ 27.

consideration, we find that the *NAL* properly proposed that the compounded forfeiture amount of $10,000 is the appropriate sanction for the violations described above. Consequently, Minority is liable for a forfeiture of Ten Thousand Dollars ($10,000).

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended,[62] and Sections 0.111, 0.311 and 1.80 of the Commission's rules,[63] that Minority Television Project, Inc., licensee of noncommercial educational Station KMTP-TV, San Francisco, California, FORFEIT to the United States the sum of Ten Thousand Dollars ($10,000) for willfully and repeatedly broadcasting advertisements in violation of Section 399B of the Act, 47 U.S.C. § 399b, and Section 73.621 of the Commission's rules, 47 C.F.R. § 73.621. IT IS ALSO ORDERED that Minority's Petition for Declaratory Ruling dated June 13, 2000, IS DISMISSED AS MOOT.

19. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482, within thirty (30) days of the release of this Forfeiture Order. *See* 47 C.F.R. § 1.80(h). The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above, and also should note the NAL/Acct. No. referenced above. If the forfeiture is not paid within that time, the case may be referred to the Department of Justice for collection pursuant to 47 U.S.C. § 504(a).

20. IT IS FURTHER ORDERED that a copy of this *Forfeiture Order* shall be sent, by Certified Mail Return Receipt Requested, to Minority Television Project, Inc., care of its attorney, James L. Winston, Esq., Rubin, Winston, Diercks, Harris & Cooke, LLP, 1155 Connecticut Avenue, N.W., Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

[62] *See* 47 U.S.C. § 503(b).

[63] *See* 47 C.F.R. §§ 0.111, 0.311, and 1.80.